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U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT
Director

2013 SEP 26 Kate Martin
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LEEANN FLYNN HALL
CLERK OF COURT

September 25, 2013

The Honorable Reggie B. Walton
Presiding Judge
United States Foreign Intelligence Surveillance Court
Washington, D.C. 20001

Dear Judge Walton,

Owing to the considerable importance of legal issues concerning bulk telephone metadata collection under section 501 of the Foreign Intelligence Surveillance, we are writing concerning the procedures the Court may use to ensure plenary consideration on a public record of these issues in the event that the Government seeks reauthorization of that collection.

First, we request that the Court direct the Government, if it seeks reauthorization, to file on the public record an application and supporting brief that sets forth its argument on the legality of bulk telephony metadata collection. While the Government may have supplemental classified information that is submitted to the Court under seal, it is important that there be a public record that describes the full legal basis for the Government's application.

We note that the Court has now published an opinion on telephony metadata collection under section 501 (per Judge Eagan). That decision, like earlier decisions of the Court, was reached after *ex parte* proceedings. Moreover, the Court notes (opinion fn. 4) that it explicitly did not consider the Administration White Paper on Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act (August 9, 2013) which was released after the Court's *ex parte* hearing with the Government. It is therefore important that in the briefing now being proposed the Government go first so that it is clear what legal analysis it is now relying on.

Second, we request that the Court establish a briefing schedule that enables interested persons or organizations to submit briefs *amicus curiae* responding to the Government's submission. This would be in accord with procedures utilized by the Court of Review in *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) and in *In re: Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (Foreign Intel. Surv. Ct. Rev. 2008). My organization, the Center for National Security Studies, participated as *amicus curiae* in the 2002 *In re Sealed Case*, and filed a Legal Memorandum *In re Warrantless Electronic Surveillance* before the Foreign Intelligence Surveillance Court in 2006.

Third, we believe that pursuant to section 103(a)(2), 50 USC 1803(a)(2) of the Foreign Intelligence Surveillance Act and implementing rules of this Court, this is an appropriate matter for the Court to consider en banc. Under the Act and the rules, a majority of the judges of the Court may order en banc consideration when “the proceeding involves a question of exceptional importance.” Any request by the Government to reauthorize bulk collection of telephony metadata would meet that standard.

We believe that the Court’s favorable action in response to these requests will promote the public interest in assuring that there is plenary consideration of the significant legal issues in this matter and help fulfill the Government’s commitment to greater transparency on these issues.

We are sending copies of this letter to John P. Carlin, Acting Assistant Attorney General for National Security, and Robert S. Litt, General Counsel, Office of Director of National Intelligence. We hope that they will join in these requests.

We are submitting these requests by letter. If a formal motion is required, we ask you to treat this letter as a motion or advise us that it should be refiled as such.

Thank you for your consideration of this matter.

Sincerely,



Kate Martin

cc: John P. Carlin
Acting Assistant Attorney General for National Security
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Robert S. Litt
General Counsel
Office of the Director of National Intelligence
1500 Tysons McLean Dr.
McLean, Virginia 22102